SINGAPORE REPORTS

Blue Nile Co Ltd v Emery Customs Brokers (S) Pte Ltd

HIGH COURT (SINGAPORE) — SUIT NO 76 OF 1989
CHAN SEK KEONG J
20 APRIL 1990

Civil Procedure — Summary judgment — Appeal against decision of senior assistant registrar — Claim based on allegation of fraud and negligent misrepresentation — Defence contains admission of fraud of defendants' employee — Whether summary judgment precluded — Rules of the Supreme Court 1970, O 14 r 1(2)(b)

Tort — Negligent misrepresentation — Whether there can be negligence if fraud is admitted — Negligence denied — Triable issue raised — Rules of the Supreme Court 1970, O 14 r 3

Words and Phrases — 'Allegation of fraud'

The plaintiffs agreed to buy 45,455 cartons of black tea from A to be shipped to Singapore from Port Sudan for US$500,000. The plaintiffs' bank BNB opened a confirmed irrevocable letter of credit requiring a full set of 'clean on board' bills of lading. In November and December 1987, the defendants issued bills of lading evidencing shipments of black tea, which did not arrive. The plaintiffs later received a shipment of 6,720 cartons from a different vessel in March 1988 with a lower value of US$73,897.60.

The plaintiffs commenced action on the bills of lading for the balance sum claiming that the defendants made fraudulent or alternatively, negligent misrepresentations that the shipments of black tea were made when they were, in fact, not made. The defendants filed their defence admitting fraud on the part of their employee AT, who acted without their consent or authority in issuing the bills of lading.

The plaintiffs applied for summary judgment on the ground that there was no defence. The senior assistant registrar awarded judgment. The defendants appealed to the High Court contending that the plaintiffs were precluded under O 14 r 1(2)(b) from applying for summary judgment as their claim was based on an allegation of fraud. Also, the defence to the claim was that there was no representation nor inducement as the defendants did not deal with the plaintiffs, and that the defendants cannot be liable for any negligence of the issuing bank in accepting the bills of lading. The plaintiffs argued that the claim was not based on fraud but breach of contract and/or negligence and that there was no allegation because the fact of fraud was admitted and therefore proved.

Held, allowing the defendants' appeal:

(1) The claim was one based on fraud in the technical sense with the ingredients of the tort of deceit as used in *Derry* v *Peek*.[2]

(2) The word 'allegation' in O 14 r 1(2)(b) bears the ordinary meaning of a statement that one undertakes to prove. If the matter were to go for trial, the plaintiffs would seek to prove the truth of the allegation of fraud by relying on the defendants' admission.

(3) The preclusionary effect of O 14 r 1(2)(b) was operative once the action, based on an allegation of fraud, was commenced.

(4) If the defendants did not admit their employee's fraud in the defence, the plaintiffs would have been precluded from applying for summary judgment. The meaning of the preclusionary rule cannot change just because the defendants chose to file their defence admitting fraud.

(5) Whether the defendants' employee was fraudulent or negligent was irrelevant at this stage as the defendants were entitled to plead any defence available to them in order to raise a triable issue.

(6) The plaintiffs could not rely on the alternative claim of negligent misrepresentation for summary judgment because the defendants have denied negligence, thus raising a triable issue.

(7) The plaintiffs' claim of negligent misrepresentation also failed because if the defendants were liable for the fraudulent acts of their employee, they could not rationally be liable for his negligence.

Cases referred to

1 *Grant* v *Norway* (1851) 10 CB 665 (refd)
2 *Derry* v *Peek* (1889) 14 App Cas 337 (follid)
3 *Barclays Bank Ltd* v *Cole* [1967] 2 QB 738 (follid)
4 *Newton Chemical Ltd* v *Arsenis* [1989] 1 WLR 1297 (distd)
5 *Hedley Byrne & Co* v *Heller & Partners* [1964] AC 465 (refd)
6 *Lawton* v *BOC Transhield Ltd* [1987] 2 All ER 608 (refd)

Legislation referred to

Rules of the Supreme Court 1970 O 14 r 1(2)
Administration of Justice (Miscellaneous Provisions) Act 1933 (Cap 36) [UK] s 6(1)
Uniform Customs and Practice for Documentary Credits 1983 art 26(c)(iv)

William Jansen for the appellants/defendants.
Steven Chong for the respondents/plaintiffs.

Cur Adv Vult

Chan Sek Keong J: This is an appeal by the defendants against the decision of the senior assistant registrar giving leave to the plaintiffs to enter judgment in the sum of US$135,370.25 for loss and damage suffered by the plaintiffs, and interest thereon.

The loss and damage occurred in the following circumstances: the plaintiffs had contracted to buy 45,455 cartons of black tea from a company called Africom Trading Pte Ltd ('Africom') to be shipped from Singapore to Port Sudan at the price of US$500,000. The plaintiffs' bankers, The Blue Nile Bank Ltd, opened a confirmed irrevocable letter of credit which allowed partial shipments and required, inter alia, a full set of 'clean on board' bills of lading to the order of The Blue Nile Bank and the plaintiffs as the party to be notified. In November and December 1987, the defendants issued three sets of bills of lading purportedly evidencing three shipments of 8,960, 2,800 and 7,280 cartons of black tea. The said bills were, in November/December 1978, negotiated by Africom under the letter of credit with a bank in Singapore for the total amount of US$209,249.60. No tea was in fact shipped on board the named vessels. Instead, the plaintiffs received a shipment of 6,720 cartons of black tea from another vessel

in March 1988 to the value of US$73,897.60. The plaintiffs have, in this action, given due allowance for this value.

This action was commenced on 12 January 1989. The plaintiffs' causes of action, *as pleaded* in the alternative in the statement of claim, are set out in paras 7, 11, 12 and 15. They read as follows:

> 7 The defendants at the time when they issued or caused to be issued the said first, second and third bills of lading knew and/or ought to have known that the said representations contained therein were untrue and/or were made recklessly not caring whether they were true or false.
>
> 11 Further and/or alternatively, at the time when the said representations were made, the defendants well knew or ought to have known that the plaintiffs would rely on the said representations and would be induced thereby to accept the said first, second and third bill of lading under the said letter of credit.
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> 12 In the premises, the defendants were under a duty to take care in the making the representations.
>
> 15 In breach of the said duty, the defendants were negligent in making the representations.

The defendants filed a defence on 23 February 1989 in which they pleaded, inter alia, that the three bills of lading were fraudulently issued by one Alfred Tay, their employee, without their consent or authority. Accordingly, they denied making any representations by the bills of lading. Further, they alleged that the issuing bank acted negligently in accepting the bills of lading contrary to art 26(c)(iv) of the Uniform Customs and Practice for Documentary Credits 1983.

By reason of the admission of the defendants that their manager had fraudulently issued the three bills of lading, the plaintiffs applied for summary judgment on 1 June 1989 on the ground that there was no defence to the claim. The plaintiffs succeeded in obtaining judgment before the senior assistant registrar.

In this appeal, counsel for the defendants has raised a procedural issue in addition to the matters raised in the defence. He contends that the plaintiffs' primary claim is based on an allegation of fraud, ie that of Alfred Tay in issuing the bills of lading for which there were no goods, and that the plaintiffs are precluded by the terms of O 14 r 1(2)(b) from applying for summary judgment. On the substantive defences, counsel also contends that *Grant* v *Norway*[1] is a defence to the plaintiffs' claim based on the fraud of Alfred Tay which the defendants readily admitted. By implication, the defendants were also denying the plaintiffs' alternative claim based on negligent representation. On the same issue, counsel also contends that the defendants had no dealing with the plaintiffs and therefore could not have induced them to accept the three bills of lading. The final submission is that the defendants are not liable as the loss was caused by the negligence of the issuing bank in accepting the bills of lading.

Order 14 jurisdiction — 'fraud'

The first issue is whether the claim is based on an allegation of fraud in terms of O 14 r 1(2)(b) of the Rules of the Supreme Court 1970. Order 14, so far as relevant, provides as follows:

> 1(1) Where in an action to which this Rule applies a statement of claim has been served on a defendant and that defendant has entered an appearance in the action, the plaintiff may, on the ground that the defendant has no defence to a claim included in the writ, or to a particular part of such a claim, or has no defence to such a claim or part except as to the amount of any damages claimed, apply to the Court for judgment against that defendant.
>
> (2) Subject to paragraph (3), this Rule applies to every action begun by writ other than one which includes —
>
> (a) [not relevant]
> (b) a claim by the plaintiff based on an allegation of fraud.
>
> (3) This Order shall not apply to an action to which Order 81 applies.

Counsel for the plaintiffs made two points on this issue. The first is that the plaintiffs' claim is not based on an allegation of *fraud*. The second is that it is not based on an *allegation* but on the admitted fact of fraud.

It is established law that the expression 'fraud' means fraud in the technical sense as used in *Derry* v *Peek*,[2] ie the tort of deceit: see *Barclays Bank Ltd* v *Cole*[3] and *Newton Chemical Ltd* v *Arsenis*.[4] In the *Barclays Bank* case,[3] the Court of Appeal held that robbery was not fraud. Lord Denning MR at p 744 said:

> ... in law 'fraud' is proved when it is shown that a false representation has been made knowingly or without belief in its truth or recklessly, careless whether it be true or false: see *Derry* v *Peek* (1889) 14 App Cas 337, 374, per Lord Herschell. In any case, 'fraud' involves a false representation.

In regard to this first point, counsel has contended that the plaintiffs' claim is based on breach of contract and/or negligence on the part of the defendants in relation to the issue of the three bills of lading. In my view, this is not strictly correct. There is nothing in the statement of claim which pleads a breach of contract. Paragraph 7 of the statement of claim contains a succinct statement of the tort of deceit. Not only does the allegation contain the essential ingredients of that kind of fraud, it contains no other constituent elements which establish a separate and different cause of action on which the plaintiffs rely. The defendants' answer to para 7 of the statement of claim as set out in the defence is a bare denial, but the basis of that denial is found in para 4 of the defence which states, inter alia, that:

> The said bills of lading were issued by one Alfred Tay, an employee of the defendants, acting fraudulently for his own

rather than the defendants benefit and without the knowledge, consent, instructions, or authority of the defendants. In doing so, he was acting outside the scope of his employment. In the premises, the defendants are not responsible for any representations made by the issue of the said bills of lading.

'Allegation'

With regard to the second point, counsel for the plaintiffs has contended that the claim is not based on an *allegation* of fraud in terms of the particular rule as the defendants have admitted, for the purpose of the defence, the fraud of their employee. Counsel for the plaintiffs contends that r 1(2)(b) of O 14 should be construed restrictively, for the reasons following, so as not to apply to a case where the defendants have admitted fraud before the application for summary judgment:

(a) the courts have construed the expression 'fraud' in the rule restrictively;

(b) even though the rule was introduced in England because a party charged with 'fraud' was entitled to trial by jury under s 6(1) of the Administration of Justice (Miscellaneous Provisions) Act 1933 (Cap 36), the Court of Appeal in *Arsenis*[4] has criticized its anomalous status: it is even more anomalous in the context of Singapore as we have no trial by jury;

(c) the word 'allegation' means an unproved statement or assertion, and here, the assertion has been proved.

I agree entirely with counsel's submission that the sub-rule is not only anomalous in Singapore but also that it serves no purpose whatever as we have no trial by jury. The sub-rule should be abrogated. However, it exists in a form which has meaning and to which it is the duty of the court to give effect. Reading rr 1 and 2 together, the sub-rule precludes an application for summary judgment where the action includes a claim based on an allegation of fraud. This would ordinarily mean the action when commenced. Having regard to para 7 of the statement of claim, I have no doubt that this action, when commenced, is based on an allegation of fraud. Once this pre-condition is satisfied, the preclusionary effect of the sub-rule operates. If the defendants had not filed their defence, the plaintiffs would not have been able to contend that fraud had been admitted, and they would not have been able to apply for summary judgment. The meaning of the sub-rule cannot change because the defendants chose to file their defence. The preclusive condition is the allegation of fraud, and not the admission of fraud.

The word 'allegation' in the sub-rule bears the ordinary meaning of a statement that one undertakes to prove, and, of course, in the present case, if the matter were to go for trial, the plaintiffs would seek to prove the truth of the allegation of fraud by relying on the admission of the defendants. But, the mere assertion of fraud is not its own proof even though the plaintiffs have in their possession the proof. In this sense, and because of the adversarial nature of the proceedings, every action by a plaintiff must, on the pleadings, start with assertions of fact upon which the liability of a defendant is founded. They are in the nature of allegations. Even if the defendants had, prior to the plaintiffs commencing this action, admitted the fraud of Alfred Tay, the plaintiffs could only have pleaded that the defendants had admitted the fraud of their servant, but until the defendants had put in their defence or filed their affidavit, the pleading would remain as an allegation. In my view, the claim is still, at that point of time, based on an allegation of fraud.

Accordingly, notwithstanding the force of the plaintiffs' arguments, I am constrained by the clear words of the sub-rule to hold that the plaintiffs' claim is based on an allegation of fraud and that they are precluded from applying for summary judgment. I can see no injustice to the plaintiffs in denying them the right to apply for summary judgment. They could have applied for judgment on the ground that the defence did not disclose a defence in law in that the defendants were liable for the fraud of their servant, *Grant* v *Norway*[1] notwithstanding. They chose not to do so. Moreover, this judgment does not prevent them from doing so on that basis.

In the circumstances, although counsel for the plaintiffs have urged me to state my views on *Grant* v *Norway*[1] on the ground that I have heard full arguments on it, I decline to do so. The reason is that the plaintiffs have the choice of appealing against my decision or making a fresh application for judgment on the ground that the defence does not disclose a defence. I believe they are more likely to take the latter course. They may, of course, take both courses and I believe the probability of their taking the latter course is higher than in respect of the former course. It is not desirable that in these circumstances that I should say anything which may be prejudicial to either party.

Alternative claim

Counsel for the plaintiffs has also contended that the plaintiffs are entitled to succeed on their alternative claim based on negligent misstatement. The contention is that the defendants owe a duty of care not to make any misstatements in their bills of lading to persons whom they know or ought to know will rely on them, that the plaintiffs as the consignees named in the bills of lading are such persons that the defendants' employee breached the duty negligently, and that the defendants relied on the said bills and suffered a loss. I agree with this proposition of law: see *Hedley Byrne & Co Ltd* v *Heller & Partners Ltd*;[5] *Lawton* v *BOC Transhield Ltd*.[6] However, the difficulty here is that the defendants have, by implication, denied any negligent breach by pleading a wilful breach. A wilful act is not a negligent act.

Counsel for the plaintiffs seeks to overcome this difficulty by relying on the judgment of the Court of Appeal in *Arsenis*.[4] In that case, the said plaintiffs ('Newton') claimed the repayment of commission and bonus commission paid by them to the defendant ('Arsenis'), who was their self-employed sales representatives, on sales orders fabricated by Arsenis. Newton's causes of action were founded on breach of contract and fiduciary duty and negligence. Newton applied for summary judgment and Arsenis pleaded that the claim was based on an allegation of fraud. The Court of Appeal, whilst agreeing that an allegation of fraud could be made without actually using the word 'fraud' in the pleading, held that although Newton's averments contained all the essential ingredients of a *Derry* v *Peek*[2] fraud, Newton had expressly chosen to found their action on breach of contract and fiduciary duty and negligence and not fraud, and to succeed with the claims as pleaded, Newton did not have to prove that Arsenis had acted dishonestly, and that accordingly, Newton was entitled to apply for and to obtain summary judgment.

Nicholls LJ analysed the issues (at p 1302) as follows:

> Order 14 r 1(2)(b) is directed at actions in which a plaintiff has chosen to put forward a claim founded on *Derry* v *Peek* fraud. *Derry* v *Peek* fraud founds entitlement to damages: the tort of deceit. It can also found a claim for rescission of a transaction brought about by such fraud. In the present case the plaintiffs have set up, as the causes of action on which alone they seek their relief, breach of contract, breach of fiduciary duty, and breach of a duty of care. In other words, their claims are not based on an allegation of *Derry* v *Peek* fraud. Their claims under para 6(8) are based exclusively on contract, fiduciary duty and negligence. To the extent that in this case these claims include an allegation of misrepresentations by the defendant, these claims contain one of the essential ingredients of *Derry* v *Peek* fraud. But although there is this common feature, the constituent elements of the plaintiffs' chosen causes of action and the constituent elements of *Derry* v *Peek* are not strictly the same. On the one hand, the causes of action relied on by the plaintiffs include ingredients not present in *Derry* v *Peek* fraud. To succeed in their claim for damages for breach of contract in respect of payment of commission, the plaintiffs have to establish the existence of a contract containing an implied term that the defendant would not claim commission except on sales actually effected. Likewise with the claim for breach of fiduciary duty: to succeed, the plaintiffs have to establish the existence of a fiduciary duty not to claim commission save on actual sales. Again with the negligence claim: the plaintiffs have to prove the existence of a duty to exercise reasonable care in making claims for commission. On the other hand, and importantly, unlike with *Derry* v *Peek* fraud, in order to succeed with their claims for repayment of commission it will not be necessary, as a matter of strict law, for the plaintiffs to prove that the defendant put forward claims which to his knowledge were not true. *Strictly, on the pleaded causes of action it will be sufficient if the plaintiffs prove that, however the claims came to be made, they were not supported by actual orders.* The plaintiffs' claim would include instances where the defendant honestly but mistakenly thought that the chemist had punched through the order on his computer terminal as well as instances where the defendant knew that no order had been transmitted. A similar analysis is equally appropriate to the claims under para 6(9) in respect of expenses. (My emphasis.)

Counsel for the plaintiffs relied on the emphasized statement of Nicholls LJ as authority for the proposition that on the pleaded cause of action in the present case, ie negligent misstatement, it is sufficient if the plaintiffs prove, as they have done, that the bills of lading were not supported by any goods. I am not persuaded. In my view, the statement of the law of Nicholls LJ cannot be applied to the facts of the present case. In *Arsenis*,[4] it did not matter how Arsenis pleaded his defence as he was not entitled to the commissions he had received because they were not supported by actual sales. He was liable to repay them to the said plaintiffs (i) in contract, on the ground of breach of an implied term or (ii) on the ground of breach of fiduciary duty arising from his relationship with the plaintiffs or (iii) on the ground of negligence, that if he had not claimed the commissions fraudulently, he must have claimed them honestly but mistakenly. It should also be noted that Arsenis did not plead by way of defence that he made his claims fraudulently. He could not simply because that would not have provided him with any defence. Naturally, he decided to deny, and denied all the allegations against him, which allegations included all the ingredients of *Derry* v *Peek*[2] fraud. Arsenis was liable whether he was fraudulent or negligent. But it is obvious he cannot be liable both for fraud or negligence at the same time.

In the present case, however, the plaintiffs are faced with a rather different situation where they are not able to rely on any other cause of action on which they can succeed in an application of summary judgment if the defendants can show that there is a triable issue on the claim based on negligence. By denying negligence, the defendants have raised a triable issue. They, of course, have gone further than merely denying negligence. They have positively alleged fraud on the part of their own freight manager. On this plea, I am unable to see how the plaintiffs can succeed by showing that the three bills of lading were not supported by goods, which fact has been admitted by the defendant. If they succeed at all at this stage, it is on the basis that the defendants were liable for the fraudulent acts of their servant and not on the ground that the defendants were liable for the negligence of their servant. Whether or not Alfred Tay was, in actual fact, negligent or fraudulent, is irrelevant at this stage of the proceedings as the defendants are entitled to plead any defence available to them. *Grant* v *Norway*,[1] on the face of it, provides a defence in law. If *Grant* v *Norway*[1] is good law in Singapore and is applicable to the facts as alleged by the defendants, it provides a complete defence to the action. If the defendants are not liable for the fraud of their servant they cannot, rationally, be liable for his negligence.

Accordingly, the plaintiffs must, at this stage of the proceedings, fail on the alternative claim on the evidence before me. The appeal is allowed with costs. The defendants are entitled to unconditional leave to defend on the alternative claim based on negligent misstatement.

Appeal allowed.

Solicitors: *Jansen Menon & Partners*; *Drew & Napier*.

Reported by *Seah Min Wai*

Chong Ah Kwee & Anor v Viva Realty Pte Ltd

HIGH COURT (SINGAPORE) — SUIT NOS 1600 OF 1985, 1661 OF 1985, 1662 OF 1985, 1667 OF 1985, 1668 OF 1985, 1689 OF 1985, 1690 OF 1985, 2027 OF 1985, 2028 OF 1985 AND 3208 OF 1985
CHAN SEK KEONG J
19 MARCH 1990

Land Law — Agreement for sale and purchase of property — Compensation for shortfall in area of flat — Whether shortfall can be compensated for under terms of sale agreement — Calculation of compensation — Whether purchasers had waived right to compensation by completing agreement

Contract — Breach — Breach of warranty — Estimate of area of flat — Whether warranty — Whether genuine or bona fide — Compensation for shortfall in area of flat — Estimation resulting in serious or vital misdescription or affects value of flat

The defendants were the developers of a block of flats. By an agreement for sale, a flat was sold to the original purchasers. In the agreement, the flat was described as estimated to contain a floor area of 2,100 sq m. The flat was later sold to the plaintiffs by the original purchasers for $460,000. The defendants entered into a fresh sale agreement and under a deed of assignment the original purchasers assigned all their 'rights title and interest ... of the assignors in the agreement for sale'. At the time of completion, a shortfall of 16.47% of the area of the flat was discovered. The plaintiffs attempted to complete without prejudice to their claim for abatement but the defendants refused, demanding that the plaintiffs complete the purchase or 'rescind the contract'. The defendants later gave notice that if the purchase was not completed within seven days, the plaintiffs would be treated as having breached or rescinded the contract. The plaintiffs then completed the agreement. The plaintiffs then commenced action for rescission of the sale and purchase agreement on the ground of fraudulent misrepresentation in relation to the area of the flat and for other consequential reliefs. The statement of claim was amended to include an alternative allegation of negligent misrepresentation and a claim for an abatement of the purchase price on the ground of a shortfall in the area of the flat purchased by the plaintiffs. At the trial, the parties agreed to have only one issue tried, and that is whether the plaintiffs are entitled to compensation on the purchase price of the flat for the shortfall in its area. One of the elements in the defence is that the plaintiffs have waived their rights by completing and refusing the defendants' offer of 'rescission'. The defendants also argued: (1) that as there was no breach of contract or warranty on the part of the defendants, no compensation could be claimed; (2) that the plaintiffs in completing the purchase had waived any right to compensation; (3) that the misdescription by the defendants did not cause the plaintiffs any loss as it was made after the plaintiffs had completed the sub-purchase; and (4) that cond 11 of the Law Society's Conditions of Sale 1981 was not fulfilled in that the market value of the flat was about $425,000 and therefore the misdescription was not of a serious nature nor did it affect the value of the flat.

Held, allowing the plaintiffs' claim:

(1) The court disbelieved the defendants' evidence on the estimation of the area of the flat. Either the defendants did not make a genuine estimate or they deliberately did a fraudulent calculation.

(2) Where a contract of sale contains a compensation provision, compensation is part of the bargain. That being the case, it is, in the court's view, perfectly reasonable to construe the word 'estimated', assuming it is a warranty, to mean that the defendants have estimated the area but that if a mistake is made, the plaintiffs will not be entitled to annul the contract or to compensation unless the estimation has resulted in a misdescription which is of a serious/vital nature or affects the value of the flat.

(3) Any doubt as to the ambit of the defendants' warranty should be construed in favour of the purchaser. Even if the estimate had been bona fide, compensation is still available to the plaintiffs if the misdescription falls within the parameters of cond 11. It is not necessary to show that the error or misdescription amounts to a warranty before a right of compensation arises.

(4) The defence of waiver was not available to the defendants for the following reasons:

(a) On a question of fact, the defendants did not offer the plaintiffs rescission with a full refund of the progress payments. The plaintiffs were given a Hobson's choice.

(b) No principle has been recognized that an application for relief must be made before completion. Where there is a compensation provision in a contract of sale, different considerations apply.

(c) Subject to considerations of hardship, courts of equity have allowed purchasers to elect to take all he can get with proportionate abatement from the purchase money where there are errors or misdescriptions.

(d) In cases of claims made under compensation provisions, the question is one of construction and compensation has been allowed even after completion. Waiver is a question of fact and sometimes of law. The intention of the plaintiffs was absolutely clear. They demanded completion with an abatement and when they were rebuffed and threatened with default, they decided to complete after reserving their right to claim an abatement after completion.

(5) Where a party has reserved his claim, there is no justification for a rule of law that he must determine his claim first before completing the purchase. The object of cond 11 is to give equal contractual rights to the vendor and the purchaser in terms thereof.

(6) Condition 11, on its ordinary construction, means that neither party shall be entitled to compensation for any misdescription if it is *neither* of a serious/vital nature *nor* considerably affecting the value of the property. Accordingly, if it is